United States Court of Appeals

FOR THE NINTH CIRCUIT

SHIRLEY MOON,
Appellant,
vs.
ORVILLE FREEMAN, as Secretary of Agriculture, and COMMODITY CREDIT CORPORATION,
Appellees.
No. 21008

Appeal from a judgment of the United States District Court for the Eastern District of Washington, Northern Division

HONORABLE CHARLES L. POWELL, *Judge*

APPELLANT'S REPLY

FRANCIS CONKLIN, S. J.
AND
WESLEY A. NUXOLL
South 214 Main Street
Colfax, Washington
Attorneys for Appellant

KERSHAW & INC

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RESTATEMENT OF THE CASE

The facts are as outlined in Appellant's Opening Brief and Appellees' Counterstatement of the case, excepting that Appellees' Counterstatement of the case is misleading in the following particulars:

(1) The requirement that exporters purchase marketing certificates was not established for the purpose of financing payments to producers as stated by Appellees (page 4). There is no evidence to this effect; there is no regulation to this effect; and, the statute does not so provide. There is no relationship between the export certificates purchased by exporters and the payments made to producers. The amount of wheat exported was .523% of *actual* production, whereas certificates were payable to only *complying producers* on .45% of their *average* production (R. 11 & 12).

(2) The effect of the export marketing certificate is not to increase producer prices. The effect is to deprive the producer of the benefit of World prices by placing a Twenty-five (.25c) cent per bushel tariff, tax or duty on each bushel exported thereby reducing the availability of World price.

(3) Only after the export certificate had served the purpose of making United States wheat non-competitive is a refund in any amount provided to the exporter. Contrary to Appellees' contention at page 4 of their Brief, there was nothing tentative about the exporters' payment of Twenty-five (25c) cents per bushel. The payment was exact. The refund, if any, was tentative.

OUTLINE OF ARGUMENT

I. Appellees' arguments are answered in the format as set forth by them. In summary the answers are framed on the following basis:

(a) Appellees' Argument I and II assume the lack of any distinction between the terms "tax" and "duty," and, also assumes that Article I, Section 9, Clause 5 was not intended as a restriction on the exercise of the commerce powers. They, thereafter, fail to distinguish between the constitutional grants and restrictions of powers relating to three separate items: interstate commerce, commerce in the form of imports, and commerce in the form of exports. The power over interstate commerce and imports cannot be equated with the power over exports in view of the constitutional restrictions relating to latter.

(b) Appellees' Argument No. III and IV casts aside all Constitutional History in favor of an "evolving constitutional philosophy." The evolving constitutional philosophy, while properly interpreting grants of power in a manner to give full efficacy to the power in view changing needs, does not permit an interpretation resulting in a disregard of constitutional restrictions.

II. Appellant's Argument, restated, is:

(1) The term "tax or duty" as used in Article I, Section 9, Clause 5 contemplates a prohibition against the imposition of any economic burden on exports, or the process of exporting, whether the enactment is designed as a revenue raising or as a regulatory measure.

(2) Article I, Section 9, Clause 5, is not only a restriction on the taxing authority of Congress as granted in Article I, Section 8, Clause 1, but also

restricts the means available for regulating Commerce with foreign nations granted in Article I, Section 8, Clause 3.

REPLY TO APPELLEES' ARGUMENT I

Appellees' argument assumes that the words "tax or duty" as used in Article I, Section 9, Clause 5 are synonymous and connote only the raising of revenue for the general support of government. Appellees, by virtue of this assumption, arrive at the conclusion that the export limitation has no effect on the commerce regulatory powers.

Appellees' basic assumption is incorrect. There is no question but that the term tax, as used in Article I, Section 8, Clause 1, is generally defined as meaning a system for raising revenue for the general support of government. This is the basis for the holdings in each of the cases cited by Appellees. None of those cases, however, undertake to analyze and define the term "tax or duty" and specifically each word independently, as used in the Clause in question.

United States v. LaFrance, 282 U.S. 568 (1930), *Lipke v. Lederer,* 259 U.S. 557 (1921), and *United States v. Butler,* 332 U.S. 371 (1947) all fall in the general category of *defining the powers* of Article I, Section 8, Clause 1 and they relate specifically to defining the word "tax." None of the cases relate to the word "duty"; and, none of the cases are involved with the *restriction on power* in Article I, Section 9, Clause 5. They form no authority for interpreting that Section and Clause.

The *Head Money Cases* 112 U.S. 580 (1884) is not consistent with Appellees' position. The case involved a monetary fee imposed on imports, i.e. the business of bringing passengers from foreign countries. The Court was concerned with interpreting *two grants of power* (Article I, Section 8, Clause 1 and Article I, Section 8, Clause 3). It was argued that the "tax" was unconstitutional as not being for the common defense and general welfare. The Court sustained the matter on the basis of the commerce power. *In doing so the Court spoke of the tax—so far as it could be called a tax—as an "excise duty" permissible in regulating imports under the commerce clause.* It must be remembered that the limitations of Article I, Section 9, Clause 5, relate only to exports and that there is no similar restriction regarding imports. The case is significant in recognizing a distinction between the terms "tax" and "duty."

Appellees' argument (p. 9 & 10), that the export charges were intended to defray costs of export payments made to the producers is not sustained by the Act or the evidence.

Morrison Milling Co. et al v. Freeman, No. 19794 and *National Biscuit Co., et al, v. United States,* No. 19795, United States Court of Appeals, District of Columbia, involved domestic processors and does not purport to discuss the limitations regarding exports.

REPLY TO ARGUMENT II

Congress has the power, in the course of regulating interstate commerce, to impose economic burdens and

regulate prices. Interstate commerce, however, is not subject to the restrictions of Article I, Section 9, Clause 5 and, hence the nature of the authority as to each must be distinguished. Similarly, imports are not subject to the same restriction and a distinction must be recognized between the power over imports as opposed to exports. Appellees attempt to apply this same authority to foreign commerce, in the form of exports, does not find foundation in the authorities cited.

Rodgers v. United States, 332 U.S. 371, 374 (1947), *Wickard v. Filburn,* 317 U.S. 111 (1942), *United States v. Strangland* 242 Fed (2d) 843 CA 7 (1947) and *United States v. Rock Royal Corp.* 307 U.S. 533 (1938) all dealt with powers over interstate commerce. The *Head Money Case,* supra, and *Board of Trustees v. United States,* 289 U.S. 48 (1932) involved the issue of imports rather than exports.

Board of Trustees v. United States, supra, does make one substantive contribution to this case. The case involved the issue of whether a "duty" on imports was a "tax" and as such subject to the constitutional limitation that Congress may not lay a tax so as to impose a direct burden on an instrumentality of the State in the performance of a governmental function. The Court held that since the measure was intended for regulation rather than revenue, and raised only incidental revenue, the impost involved was an exercise of Congress' power to regulate commerce and not of the taxing powers. It discussed the impost on imports and spoke of it as a duty in view of its regula-

tory characteristics and *spoke of "duties" as a common means of exercising the power to regulate commerce.* The case supports the proposition that both revenue raising measures, and regulatory measures dependent on placing economic burdens on exports as an incident of regulation, are forbidden since both a "tax" and "duty" are forbidden by Article I, Section 9, Clause 5. If the word "duty" signifies a means for regulation of commerce, foreign commerce, then its use in the clause in question can only be construed to mean a restriction on the original grant of power to regulate foreign commerce.

United States v. West Texas Cottonoil Co. 155 F (2d) 463 C.A. 5 (1946) while holding that monetary penalty may be utilized to control production does not involve the imposition of a charge upon the act, or process of exporting or goods exported. The Court stated, furthermore:

> "Besides the authorities make it quite plain that the invoked Constitutional provision (Art. I, Sec. 9, Cl. 5) does not apply to a situation on the manufacture or handling of products. It applies only where it is laid specifically or exclusively on exports or matters directly connected with exports."

In the present case the economic burden is placed specifically and exclusively on exports.

Neither *Pace v. Burgess,* 92 U.S. 372 (1875) nor *Turpin v. Burgess,* 117 U.S. 504 (1886) cited by Appellees is in point. In each case the nominal charge involved had no relationship to exports other than to identify

the goods to be exported and to exclude them from a direct tax imposed upon domestically consumed products. The Court definitely pointed out:

> "The stamp was intended to no other purpose than to separate and identify the tobacco which The manufacturer desired to export . . . *It bore no proportion whatever to the quantity or value of the package to which it was affixed. These were unlimited except by the discretion of the exporter, or the convenience of handling." Pace v. Burgess,* supra. (Emphasis added)

In this case the charge fixed is a definite charge for each unit exported, and, is a condition of export.

Mulford v. Smith, 307 U.S. 38 (1939) involved a penalty on marketing of excess tobacco. It did not involve Article I, Section 9, Clause 5.

Armour Packing v. United States 209 U.S. 56 (1907) involved the regulation of freight rates on railroads in interstate commerce. The effect on exports was held to be too remote (i.e. not on the process of exports) to constitute a tax or duty.

Cornell v. Coyne, 192 U.S. 418 (1903) involved a general tax on all cheeses produced. No impost on the act of export was involved. The Court held that the prior ordinary burdens of taxes which rest on all similar property was not prohibited merely because some of that property was subsequently placed in export.

Appellees incorrectly set forth the import of *Cooley v. Board of Warden* (p. 25) 12 How. 299 (1851). The case held that pilotage fees, at the time the Constitution was adopted, were considered separate and dis-

tinct from taxes, duties and imposts and, therefore, were not within the definition of those terms as used in Article I, Section 10, Clauses 2 and 3.

Appellees' description of the Wheat Marketing Allocation Program, (pages 16 to 20 Appellees' Brief) is inaccurate and misleading in several important particulars.

(1) The Secretary of Agriculture had it wholly within his power to cause compliance with the International Wheat Agreement (13 *United States Treaties and Other International Agreements,* p. 1572) without the export marketing certificate and also had the power to stabilize farmers income in view of the fact that the original support price for wheat was to be established by the Secretary (Godfrey's Affidavit R. 42 para. 7); and,

(2) No where in the evidence (Godfrey's Affidavit R. 40-47), or in the Act, is there any authority for the statement that financing of the subsidies was to be through sales of certificates to processors and exporters.

Appellees' efforts to compare the restrictions on the powers of the States as set forth in Article I, Section 10, Clause 2 and the limitation of the power of Congress in Article I, Section 9, Clause 5 as to their power to lay "duties" is not accurate. The limitation on the powers of the States includes the express exception.

> ". . . except what may be absolutely necessary for executing its inspection laws."

The language, thus, permits regulation by the States on the basis of duties imposed to facilitate inspections. By creating this express exception to the term "duty" the Constitution tends to define the term itself as being a regulatory device on imports or exports. The express exception certainly implies that at the time the Constitution was framed the elimination of the power to impose a "duty" eliminates all power to regulate commerce—even to the extent of inspection. By providing that funds derived from duties in inspection laws should become a part of the general treasury the Constitution further implies that incidental revenue may be derived from duties, even though revenue is not their primary goal.

REPLY TO ARGUMENT NO. III

Appellees choose to ignore the Constitutional History. The entire argument proposed by Appellees begs the basic question. It is undisputed that Appellant exporter was charged the net sum of One Hundred Sixty-eight and 52/100ths ($168.52) Dollars to participate in the export market on a limited scale. His gross charge was Four Hundred Eleven and 93/100ths ($411.93) Dollars. His net proceeds were One Hundred Sixty-eight and 52/100ths ($168.52) Dollars less than they would have been had the Governmental burden not been imposed. To argue that this is not an economic burden seems totally inadequate.

The mere fact that the program finds it necessary to subsidize the exporter, in the form of refunding to him part of the export charges, is an unquestionable and irrefutable indication that the initial exaction

has been an economic burden on the process of exports. The admitted reason for any refund is that the initial exaction has placed the exporter in a position where he cannot compete on the World market. The "tariff" has priced him out of World competition.

Economic theory is argued in total reverse, that is, that World prices are established by domestic prices in the United States and, in effect that domestic prices (as controlled by the Secretary) are in no manner affected by World prices. In addition, it is strange to see Appellees argue in one breath that the payments made to complying producers are financed through the export charges, (which can only mean that they were profitable) and, in the second breath that there is no economic burden on the exporter or the process of exports because the CCC subsidized him in part, in full, or in excess of the price paid for certificates. The two arguments seem incompatible.

The fact that exporters pass on to the buyer the cost of the certificate involved does not eliminate the existence of an objectionable "tax or duty" of necessity this would occur in every type of "tax or duty." This issue was commented on by the Court in *Thames & Mercey Insurance Company Ltd. v. United States,* 237 U.S. 19 (1914) which involved a stamp tax on policies of insurance; and in a case involving taxation by the State of imports in *Brown v. Maryland* 7 U.S. 262 (1837). The Court held that an impost violated the mandate of the Constitution in effect because the impost of necessity raised the price of the article either to the consumer or the exporter or importer. As such the impost was an objectionable duty.

REPLY TO ARGUMENT IV

Every enactment of the Congress is presumed constitutional. There is also an evolving Constitutional philosophy. These two propositions are set forth in clarity by *Brown v. Maryland* 12 Wheat (25 U.S.) 419 (1827) and *McCulloch v. Maryland* 4 Wheat (17 U.S.) 316 (1819).

The evolving Constitutional philosophy has never permitted, or required, a total disregard of the express restrictions imposed on the central government, or Congress specifically. Grants of power in the Constitution, under the evolving constitutional philosophy, must be construed to give full efficacy to those powers. Similarly restrictions on grants of power must be given a full effect consistent with the spirit of the restrictions.

Chief Justice Marshall, who authored the opinions in *Brown v. Maryland,* supra, and *McCulloch v. Maryland,* supra, certainly did not intend the broad application espoused by Appellees, that the Constitution be construed in the "light of the times" to the extent that the spirit of its restrictions should be destroyed. In *Marbury v. Madison,* 1 Crench 137 (1803) he discussed the limitations on Federal Power

> "The government of the United States is of the latter description (limited powers). The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a govern-

ment with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by an ordinary act."

"Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it."

In *Fairbanks v. United States* 181 U.S. 283 (1900) the Court, in discussing Article I, Section 9, Clause 5 restated the theory of interpretation of constitutional restriction

> *"It is a restriction* on the power of Congress; and as, in accordance with the rules heretofore noticed, the grants or powers should be so construed as to give full efficacy to those powers and enable Congress to use such means as it deems necessary to carry them into effect, so in like manner a *restriction should be enforced in accordance with its letter and spirit, and no legislation can be tolerated which, although it may not conflict with the letter, destroys the spirit and purpose of the* restriction imposed. (Emphasis added)

The theory of an evolving Constitution can only mean that, while a grant of power must be given an interpretation permitting its full exercise in view of the needs of the nation, nevertheless that interpretation may not be inconsistent with, or eliminate, restrictions imposed on the exercise of Congressional power. To do otherwise is to allow an entirely un-

bridled legislative branch which alone, day by day, on the basis of immediate national policy modifies and alters Constitutional limits.

As Chief Justice Marshall stated, there is no middle ground. There is no room for an evolving constitutional philosophy which results in the total disregard of restrictions on the exercise of power, and, the evolving constitutional philosophy has not previously been requested to cover such a broad spectrum of Congressional authority.

RESTATEMENT OF APPELLANT'S ARGUMENT

(1) The term "tax or duty" as used in Article I, Section 9, Clause 5 is not limited to the connotation of revenue raising measures. Rather, the term is designed to prohibit the imposition of any economic burden on exports, or the process of exports; and thus to serve as a restriction on both the general taxing powers of the central government, and the commerce powers.

The Constitutional History of the clause supports this interpretation. The debate in the Constitutional Convention revolved around the need to permit duties or taxes on exports as a means of regulating trade. The attempted amendments designed to permit the regulation of trade were all defeated. *Farrand,* The Records of the Federal Convention, Vol. II pps. 359-365; *Madison,* "Journal of the Constitutional Convention" Vol. II, p. 574.

(2) The words "tax" and "duty" are separate and istinct words. Each must be given consideration.

> "In expounding the constitution every word must have its due force, and appropriate meaning; for it is evident from the whole instrument that no word was unnecessarily used, or needlessly added—Every word appears to have been weighed with utmost deliberation, and its full force and effect fully understood."
>
> Chief Justice Tanney in *Holmes v. Jennison,* 14 Pet. 540. See also *Wright v. United States,* 302 U.S. 583.

The term "duties" has been generally considered s a system for commercial regulation—specifically ne regulation of imports and exports. *University of llinois v. United States,* 289 U.S. 48 (1933); *Pollock . Farms Loan & Trust Co.,* 158 U.S. 601 (1895); *Thomas v. United States,* 192 U.S. 370 (1903); *Story,* Commentaries on the Constitution, Vol. II, sec. 1088. The use of the word "duties" in conjunction with he word taxes, results in prohibiting the regulation f commerce through the imposition of an economic urden.

(3) The restrictions of Article I, Section 9, Clause , have consistently been authoritatively recognized s restricting both the general taxing powers and the ommerce powers. *Storey,* Commentaries on the Constitution of the United States, Vol. I, p. 712 (1873); *Burdick,* The Law of the American Constitution, p. 94; *Willoughby* on the Constitution, Vol. II (2d ed), . 694; *Gavit,* The Commerce Clause of the United States Constitution, p. 202; *Weaver,* Constitutional Law and its Administration, p. 286.

(4) The Courts have recognized that the commerce clause is subject of limitation (*Adair v. United States* 208 U.S. 161, (1907); *Gibbons v. Ogden,* 22 U.S. (1824)) and that Article I, Section 9, Clause 5 is one of those limitations.

(5) The Courts have uniformly rejected any direct imposition of economic burdens on exports and directly insisted on free access to foreign markets.

> ". . . the question of power is not to be determined by the amount of the burden attempted to be cast. The constitutional language is, 'no tax or duty.' "

> ". . . *the purpose of the restriction is that exportation**** *all exportation—shall be free from national burden.* This intent, though obvious from the language of the clause itself, is reinforced by the fact that in the Constitutional convention Mr Clymer moved to insert after the word 'duty' the words 'for the purpose of revenue,' but the motion was voted down. *So it is clear that the framers of the Constitution intended, not merely that exports should not be made a source of revenue to the national government, but that the national government should put nothing in the way of burden upon such exports. If all exports must be free from national tax or duty, such freedom requires not simply an omission of a tax on the articles exported, but also a freedom from any tax which directly burdens the exportation; . . .*" (Emphasis added) *Fairbanks v. United States,* 181 U.S. 283 (1900)

See also *Thames & Mersey Marine Insurance Co. ltd. v. United States,* 237 U.S. 19 (1914); *United States v. Hvoslef,* 237 U.S. 1 (1916); and *Brown v. Maryland,* 7 U.S. 262 (1837).

Exports and the process of export are to be free rom economic burden. A clear economic burden is mposed under the Act. The burden is a direct im- ost occurring as a condition of export. As such it is learly on the process of exports, if not on the article tself. The Act is unconstitutional in imposing this urden.

CONCLUSION

The following sections of the Agricultural Adjustment Act of 1964 should be declared unconstitutional, o-wit; 7 U.S.C. 1379c (a) (As amended Apr. 11, 1964, Pub. L. 88-297, Title II Sec. 202 (12-14), 78 Stat. 180, 181); 7 U.S.C. 1379c (C) (As amended Apr. 11, 1964, Pub. L. 88-297, Title II, Sec. 202 (12) - (14), 78 Stat. 180, 181); 7 U.S.C. 1379d (b) (As amended Apr. 11, 1964, Pub. L. 88-297, Title II, Sec. 202 (15) - (17); 78 Stat. 181, 182), insofar as said sections require the purchase of export marketing certificates as a condition of exporting wheat.

The Order granting Appellees' Motion for Summary Judgment (Tr. 81) should be reversed and an Order should be entered granting Appellant's Motion for Summary Judgment and granting Appellant Judgment in the sum of $168.52 and costs.

DATED, Colfax, Washington
October 7, 1966

Respectfully submitted,

WESLEY A. NUXOLL
Attorney for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WESLEY A. NUXOLL
Attorney for Appellant